

STATE OF VERMONT
PUBLIC SERVICE BOARD

Vermont Electric Cooperative, Inc.'s)
Tariff Filing No. 8195)

Order entered: 3/15/2011

PROTECTIVE ORDER

I. INTRODUCTION

On November 12, 2010, Vermont Electric Cooperative, Inc. ("VEC") filed proposed revised tariffs reflecting a 2.71 percent rate increase. Accompanying the tariff filing was supporting prefiled testimony and exhibits. VEC filed portions of Mr. Craig Kieny's testimony, exhibit CK-1 and Schedule 2 of Exhibit MLB-1 as allegedly confidential information, pending execution of an appropriate protective order. According to VEC, this allegedly confidential information related to pricing terms from power purchase agreements that are subject to confidentiality restrictions. VEC filed an averment to support its request for confidentiality.

On December 30, 2010, the Public Service Board ("Board") issued a letter allowing the proposed tariff to take effect without investigation or hearing. On that same date, the Board issued a memorandum noting that VEC had filed certain testimony and exhibits under seal pending execution of an appropriate protective order, and that the Board had not yet received a motion for protective treatment of the allegedly confidential information. The Board informed VEC that, if it would like this information to be kept confidential, it must file a motion for protective treatment, along with supporting averments. The Board also noted that there were some inconsistencies in the information that was redacted.

On January 18, 2011, VEC filed a motion requesting that the Board issue a Protective Order to preserve the confidentiality of the allegedly confidential information.¹ VEC submitted a

1. Along with the motion, VEC filed a revised public version of Schedule 2 of Exhibit MLB-1 that included redactions consistent with the redactions in Mr. Kieny's November 12, 2010, prefiled testimony.

revised averment to support its request for confidentiality. No entity filed comments on VEC's motion.

The confidentiality of power purchase contract terms has recently been raised in several ongoing Board proceedings. We have determined it would be beneficial to explore this issue in a workshop open to all Vermont electric utilities and any other interested parties.²

While this broader exploration of confidential treatment of power purchase contract terms is underway, we determine it is appropriate to provisionally protect some of the information identified by VEC as confidential. However, as explained further below, some of the information VEC has requested be protected was filed in public materials as part of an earlier VEC tariff filing; since this information is already in the public domain, there is no basis for protecting it now. Therefore, in this Order, we provisionally grant VEC's motion in part, and deny VEC's motion in part.

II. DISCUSSION

To promote full public understanding of the basis for its decisions, the Board has actively taken steps to limit the amount of information subject to protective orders. We have encouraged parties to remove material from that protection to the extent possible. Since 2001, the Board has required petitioners seeking a protective order to submit a document-specific (or information-specific) averment of the basis for keeping confidential any document (or information) that they wish to be kept under seal. This arrangement appropriately places a heavy burden on the party seeking confidentiality to justify that decision. It also ensures that counsel for the party seeking confidentiality has actually reviewed and considered the relevant confidentiality factors, as they relate to the specific document or information at issue.³ Generally, however, the Board only resolves disputes about information when there is a genuine disagreement about its confidential

2. See the separate memorandum from the Clerk of the Board issued today for more information about this workshop.

3. *Investigation into General Order No. 45 Notice filed by Vermont Yankee Nuclear Power Corporation re: proposed sale of Vermont Yankee Nuclear Power Station to Entergy Nuclear Vermont Yankee, LLC*, Docket No. 6545 ("Entergy Docket"), Order of 11/9/01 at 5-6.

nature.⁴ However, even when the motion is uncontested the Board will review the motion and supporting averment or averments to ensure that the moving party has presented a *prima facie* case for keeping the document or information under seal.

In determining whether to protect confidential information, the Board considers three issues:

- (1) Is the matter sought to be protected a trade secret or other confidential research, development, or commercial information that should be protected?
- (2) Would disclosure of such information cause a cognizable harm sufficient to warrant a protective order?
- (3) Has the party seeking protection shown "good cause" for invoking the Board's protection?⁵

In the present instance, VEC contends that price terms related to wholesale power contracts are "commercially sensitive" and are typically not publicly released.⁶ VEC states that release of this information "would provide an entity seeking to sell power to VEC with knowledge as to VEC's position on the most significant factor at issue in negotiating power contracts, putting it at a significant competitive disadvantage." In addition, VEC represents that each of the power purchase agreements requires the parties to use "commercially reasonable efforts so that the price terms remain confidential," although, VEC acknowledges that the agreements expressly allow disclosure as required under applicable law or regulation.⁷

We have reviewed the motion and supporting materials. Vermont utilities, including VEC, have raised concerns regarding making pricing and other contract terms of power purchase agreements public. This issue will be explored further at a workshop open to all utilities and other interested parties. In the meantime, because there are potentially negative impacts to VEC ratepayers if pricing information is not kept confidential, we will protect some of the redacted

4. *Id.* at 6.

5. *See, e.g., Entergy Docket*, Order of 3/29/02 at 2.

6. However, we note that it is unusual, possibly unprecedented, for a Vermont electric distribution utility to request confidential treatment of materials supporting a request for a tariff change.

7. Attachment B to VEC Motion for Confidential Treatment of Evidence at 1.

information on a provisional basis, pending our broader exploration of confidential treatment of power purchase contract terms. Specifically, we will protect, on a provisional basis: (1) pricing information regarding VEC's contract with J Aron; (2) the total cost of VEC's contracts with Macquarie Energy, LLC (formerly Integrys Energy Services) in the test year and the rate year; and (3) the electronic spreadsheet showing power cost projections for 2011. We, therefore, grant VEC's motion for a protective order with respect to this information on a provisional basis, pending the outcome of the Board's broader exploration of confidential treatment of power purchase contract terms.

However, the remaining information which VEC is seeking to protect was previously disclosed to the public as part of VEC's Tariff Filing No. 8119 which was filed with the Board on November 13, 2009.⁸ Specifically, the pricing information VEC is seeking to protect in Tariff Filing No. 8195 regarding its contract with Entergy, its five individual contracts with Macquarie Energy, LLC (formerly Integrys Energy Services) and its contract with Constellation Energy Commodities Group was disclosed in this earlier tariff filing. Since this information is already available to the public, there is no basis for protecting it in the context of Tariff Filing No. 8195, and we deny VEC's motion for a protective order with respect to this information.⁹

We also conclude that one of the rationales asserted by VEC to support confidential treatment of the purchase power pricing is misguided. VEC's averment includes as one of the reasons for confidential treatment of the identified information the fact that each of the power purchase agreements includes a provision requiring the contracting parties to keep the terms of the agreements confidential. We do not accept that the contracting parties can arrange merely through their own agreement to shield details of the proposed power purchase from public view. Vermont law creates a strong presumption that public records, such as the testimony and exhibits

8. Tariff filing 8119 included a test year of August 2008 through July 2009, and an adjusted test year of calendar year 2010. Tariff filing 8195 included a test year of July 2009 through June 2010, and an adjusted test year of calendar year 2011.

9. We are troubled that VEC's averment states that "[t]he Confidential Information is not known outside of VEC, other than its consultants, on a confidential basis" when this is clearly not true for the information previously disclosed to the public as part of Tariff Filing No. 8119. We expect parties seeking confidentiality to perform the necessary due diligence to ensure that their averments are true and accurate. We caution VEC to make sure any future averments are accurate as we do not look favorably upon such errors.

that VEC submitted in support of its tariff filing, are to be available for public inspection.¹⁰ Consistent with our decisions in other cases in which petitioners have made similar arguments,¹¹ in our determination of whether to grant confidential treatment to the identified information we have given no weight to the contractual provisions that call for confidential treatment, and instead have independently judged the merits of the request for confidentiality without regard to the contractual provisions.

In addition, we have consistently reminded parties who seek confidential treatment for materials that they have a continuing obligation to reexamine protected information and to release material that would not cause competitive harm, or that has otherwise been made public (even during the course of the subject proceeding), particularly testimony and exhibits. We expect VEC to do the same here.

At this time, we are not explicitly ruling that any specific information should remain confidential for seven years as requested by VEC. We expect that the length of time utilities would like to keep power purchase contract information confidential will be discussed as part of our broader exploration of confidential treatment of power purchase contract terms. Parties and other persons retain the ability to challenge whether information encompassed by this ruling should be removed from the special protections adopted in this Order or removed completely from protection as confidential information.

III. ORDER

Therefore, IT IS HEREBY ORDERED that the Allegedly Confidential Testimony and Exhibits filed by VEC on November 12, 2010, and as revised on January 18, 2011, which is specifically identified in an attachment to this Order, shall be treated in this proceeding as follows:

1. Vermont Electric Cooperative, Inc. ("VEC") shall file, within ten calendar days of the date of this Order, revised redacted versions of Mr. Kieny's testimony and exhibit VEC-MLB-1,

10. 1 V.S.A. § 315.

11. See, e.g., Docket 7670, Order of 12/14/10 at 4.

Schedule 2 that show the pricing information regarding VEC's contract with Entergy, its five individual contracts with Macquarie Energy, LLC (formerly Integrys Energy Services) and its contract with Constellation Energy Commodities Group.

2. The testimony and exhibits that are subject to this Order as confidential information, and any documents that discuss or reveal documents that constitute confidential material, shall not be opened or released from custody of the Clerk of the Board except by order of the Public Service Board ("Board"). Notwithstanding this Protective Order, the members of the Board, and any employee or consultant specifically authorized by the Board to assist the Board in this proceeding may have access to such sealed Allegedly Confidential Information, but shall not disclose the contents of any such sealed information to any person who is not authorized by this Protective Order to have access to such information.

3. If any of the protected information becomes public, such information shall no longer be subject to this Protective Order. VEC shall promptly inform the Board and the Department of Public Service if it makes public any of the protected information or if it becomes aware that such information has become public.

4. The Board will retain jurisdiction to make such amendments, modifications and additions to this Order as it may, from time to time, deem appropriate, including any such amendments, modifications or additions resulting from a motion made pursuant to the Protective Agreement. Any party or other person may apply to the Board for an amendment, modification or addition of this Order. The Board specifically reserves the ability to modify this Order based on its broader consideration of confidential treatment of power purchase contracts in the workshop process noted above.

Dated at Montpelier, Vermont, this 15th day of March, 2011.

<u>s/ James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/ David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/ John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: March 15, 2011

ATTEST: s/ Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)